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Supreme Court, U.S.
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No. 03-03 425 SEP 17 2003

IN THE

Supreme Court of the United States

PATSY KEEN,

Petitioner,

v.

DIANA WEAVER, INDEPENDENT EXECUTRIX OF THE ESTATES OF FRANCIS J. WEAVER AND RITA MARIE WILSON WEAVER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The *text* of the Employment Retirement Income Security Act, 29 U.S.C. §§ 1001, *et seq.* (ERISA) commands the uniform rule of national application that the plan administrator shall distribute the benefits under an ERISA plan to the beneficiary *designated by the plan participant* unless one of the textual exceptions apply. In a 5-4 decision, the majority of the Texas Supreme Court creates a new exception to the text of ERISA through an alleged federal common law that yields the same result as the preempted Texas redesignation statute. The dissent rejects such a new exception in reliance upon the text of ERISA. Did the majority of the Texas Supreme Court err:

A. By creating a state law rule re-labeled as a federal common law that is preempted by ERISA's broad preemption clause;

B. By creating a rule that conflicts with the text of ERISA;

C. By creating a rule in conflict with this Court's decisions in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) and *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) and that alters the text of ERISA through some nascent federal common law when there is no such alleged applicable federal common law;

D. By creating a rule of application that conflicts with the textually driven uniform national standards for such a rule mandated by this Court's decision in *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) [*Egelhoff*];

E. By creating a rule that replaces ERISA's textually driven uniform rule of national application with an irrebuttable presumption that a plan participant spouse can never designate or retain a former spouse as a plan beneficiary after a divorce;

F. By creating a rule that re-writes the text of ERISA to deprive the right of a plan participant to designate or retain the beneficiary of choice;

G. By creating a rule in conflict with *Egelhoff* that replaces ERISA's textually driven uniform rule of national application with a fact-intensive variable driven rule that will vary from case to case and from state to state; and

H. By creating a rule that perpetuates the irreconcilable conflict between the "strict plan" cases, e.g. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) and *McMillan v. Parrott*, 913 F.2d 310 (6th Cir. 1990), and the "variable common law waiver" cases, e.g. *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown*, 897 F.2d 275 (7th Cir. 1990) and *Estate of Altobelli v. International Business Machines Corp.*, 77 F.3d 78 (4th Cir. 1996) such that the obligations of plan administrators vary from jurisdiction to jurisdiction in lieu of the uniform national standard that ERISA requires.

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The opinion of the Supreme Court of Texas (Pet. App. A) is reported at __ S.W. 3d __, 46 Tex. Sup. Ct. J. 804 (2003). The opinion of the Waco Court of Appeals (Pet. App. B) is reported at 43 S.W.3d 537 (Tex. App. Waco 2001).

JURISDICTION

The judgment of the Supreme Court of Texas was entered on June 19, 2003. This Court has jurisdiction of this proceeding by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to this Court's Rule 24.1(f), the pertinent constitutional and statutory provisions are set forth in the appendix to this brief.

STATEMENT OF THE CASE

I. Factual Background

Francis J. (Frank) Weaver and Patsy Keen (Patsy) were married in 1967. During a portion of their marriage, Frank was employed by Baylor College of Medicine. In 1972, Frank purchased two annuity contracts issued by Teacher's Insurance and Annuity Association and College Retirement Equities Fund (TIAA-CREF). At all times during and after the marriage, Frank was the plan participant with the exclusive right to designate the plan beneficiary. He named Patsy as the primary beneficiary of those annuity contracts. Baylor College of Medicine made contributions to the annuity

contracts until 1980 when Frank terminated his employment. In 1982, Frank and Patsy divorced. As part of the property settlement, the divorce court decided the community property issues that it had the jurisdiction to divide. Frank received the annuity contracts as his sole and separate property. Patsy relinquished any interest that she had in the plans. Frank never made any contributions to the plans after his divorce from Patsy.

Frank married Diana Weaver (Diana) in 1983. They were married for eleven and one-half years before his unexpected death in 1995. During this time, Frank did not change the plan beneficiary. Frank received annual notices reminding him that Patsy remained the designated beneficiary. He received the forms to change the plan beneficiary. At the time of Frank's death, Patsy was the designated beneficiary of Frank's TIAA-CREF annuity contracts. The plans' administrators, relying on this designation and the plan documents, paid benefits to Patsy until TIAA-CREF and Petitioner were sued in this case.

II. Proceedings Below

Initially, Rita Marie Wilson Weaver (Rita), Frank's mother and the designated contingent plan beneficiary, sued Patsy and the plans to recover the plan benefits. Upon Rita's death, Diana, as Rita's independent executrix and Frank's independent executrix, substituted and joined as the plaintiff. The plans interpleaded the funds and were dismissed with the obligation to pay the benefits according to the final judgment.

Diana's claims as the successor for Frank were never clear. Diana's claims as the successor for Rita were brought

for breach of contract, conversion, waiver and redesignation under the Texas redesignation statute. Patsy brought claims for compliance with ERISA and the beneficiary designation.

After a bench trial, the trial court granted a final judgment for Patsy. [Pet. App. D]. The trial court issued findings of fact and conclusions of law. [Pet. App. C]. The trial court found that ERISA preempted the Texas redesignation statute, that ERISA controlled, that the plan beneficiary designation controlled and that Patsy had not given up any rights to be the designated plan beneficiary by waiver, estoppel or otherwise.

On appeal, the Waco intermediate appellate court reversed. It found that ERISA preempted the Texas redesignation statute, but then curiously held that the Texas redesignation statute could be revived through a federal common law.

On further appeal, a sharply divided Texas Supreme Court in a 5-4 decision affirmed the Waco intermediate court of appeals but on different grounds with the same effect. The majority adopted a federal common law of waiver that coincidentally effected the same redesignation contemplated by the preempted Texas redesignation statute. As detailed by the dissent, the majority engaged the errors that form the basis of this petition.

SUMMARY OF ARGUMENT

As this Court held in *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), ERISA unambiguously supplies each plan administrator with a textually driven, unambiguous, easily applied, uniform and harmonious national rule to distribute

plan benefits to the participant designated plan beneficiary. The majority opinion of the Texas Supreme Court is one of the most recent cases in the vanguard of the judicial assault on *Egelhoff* and the text of ERISA. The Court must intervene to re-establish uniformity and order and respect for the prudence of this Court and the text of ERISA.

The question in this case is whether the plan administrator of an ERISA employee pension benefit plan must pay according to the plan's designated beneficiary as the text of ERISA dictates or whether the plan administrator must pay according to the unchartered variables of some imported law of equitable waiver. This case, accordingly, involves the core concepts under ERISA about the textual scope of the right to designate or retain the beneficiary under an ERISA plan and the accompanying payment of benefits to that designated beneficiary.

At all times during the marriage and afterwards, Frank alone had the sole right to designate or retain the beneficiary under the plan. Frank's exclusive right to designate or retain the beneficiary controlled whether Patsy could claim any community property interest in the plan or whether the plan was Frank's pre- or post marital separate property. Frank's exclusive right to designate or retain the beneficiary survived the divorce decree and any agreement of the parties.

Frank exercised his exclusive right and, for his own reasons, maintained Patsy as the sole beneficiary under the ERISA plan. Thirteen years and a second marriage did not persuade Frank to change the beneficiary. Annual reminders that Patsy was the beneficiary and available annual beneficiary change forms did not persuade Frank to change the beneficiary. The plan administrator, following the text of

ERISA, sought to pay the benefits to Patsy as she was the named beneficiary.

In a 5-4 decision, a majority of the Texas Supreme Court holds that the plan administrator cannot rely upon the text of ERISA and simply pay Patsy as the designated beneficiary. Instead, the majority requires the plan administrator to decide whether Frank could not exercise his right to designate or retain the beneficiary. It shifts the focus from Frank's right to designate or retain to a focus on Patsy's alleged waiver under some imported equitable doctrine of waiver that is not contained in the text of ERISA. The majority holds that the divorce agreement or adjudication of any right, title and interest in, to or under any community property character of a plan irrebuttably presumes that Frank could never thereafter designate or retain Patsy as the plan beneficiary after the divorce.

The dissent applies the literal text of ERISA. It refuses to superimpose amorphous equitable dimensions to an otherwise unambiguous text.

Curiously, both the majority and the dissent agree (1) that the text of ERISA requires the plan administrator to pay Patsy as the designated beneficiary, (2) that the text of ERISA admits exceptions to that requirement of which none apply in this case, (3) that the Texas Supreme Court recently affirmed that equitable principles cannot be used to amend the otherwise unambiguous text of ERISA, (4) that ERISA preempts the Texas redesignation statute, (5) that the Texas intermediate appellate court erred in using a federal common law to reach the same result as the preempted Texas redesignation statute, and (6) that the text of ERISA yields a simple rule that is easily applied by plan administrators.

Yet, despite these concurrences, the majority diverges from the dissent. The majority eschews the textually driven parsimony of ERISA for a fact-intensive driven equitable waiver analysis that, like the Texas intermediate appellate court (but using different labels), used a federal common law to achieve the same effect as the preempted Texas redesignation statute. There is an analytical gap between the majority's reasoning and the majority's holding that the equitable doctrine of waiver cannot fill.

This Court must review the majority's holding. First, it creates a state law rule that is preempted by ERISA. Second, it conflicts with the text of ERISA. Third, it conflicts with this Court's holding in *Egelhoff*. Fourth, it uses a non-existent federal common law to amend the text of ERISA. Fifth, it replaces a simple rule of administration with an unpermitted irrebuttable presumption. Sixth, it replaces a harmonious uniform rule of national application with a fact-intensive variable driven rule that will vary from case to case and state to state. Seventh, it perpetuates a conflict in the law between those cases that enforce the text of ERISA as written and those that do not. Eighth, it eviscerates the uniformity inherent in ERISA. Ninth, it impermissibly conflicts with the anti-alienation provisions of ERISA.

Applicable to both I and II above is the stated position of the Secretary of Labor in his Amicus brief filed with and argued before the Texas Supreme Court. (The brief is available at http://www.dol.gov/sol/media/briefs/main.htm).

REASONS FOR GRANTING THE PETITION

I. THE MAJORITY OPINION IN *KEEN* CONFLICTS WITH THE TEXT OF ERISA, IMPERMISSIBLY RELIES UPON A NON-EXISTENT FEDERAL COMMON LAW, CONFLICTS WITH THE DECISIONS OF THIS COURT AND CREATES A PREEMPTED RULE OF STATE LAW THAT TOGETHER OR SINGULARLY USURPS THE SIMPLE UNIFORM RULE OF NATIONAL APPLICATION FOR THE DISTRIBUTION OF PLAN BENEFITS REQUIRED BY ERISA.

The majority opinion in *Keen* has further separated the plan administrator's obligation to pay plan benefits according to the plan terms from its mooring in the text of ERISA and this Court's decisions construing that same text. This Court should cure this suffusing legal error that, if not cured, will destroy the simple, uniform and harmonious rule of national application required by ERISA and this Court. The Court should grant this petition to review this case, should hear this case, should reverse the Texas Supreme Court's decision in *Keen* and should order the distribution of all plan benefits to Patsy.

A. The Text of ERISA: the Unambiguous Simple Rule:

The text of ERISA supplies the proper starting point. This starting point yields the proper analysis that avoids conflicts with the text of ERISA and with the opinions of this Court.

Among its many provisions, the text of ERISA vests Frank, as the plan beneficiary, with the right to designate the

beneficiary of the ERISA employee pension plan. ERISA §§ 1002(7) and 1002(8). Predicated on this vested right, ERISA recites that the plan must specify the basis upon which payments are to be made, states that the plan administrator must administer the plan in accordance with the plan documents and then directs that the plan administrator must pay the plan benefits to the designated beneficiary. ERISA §§ 1002(8), 1102(a)(1)(D) and 1102(b)(4).

The plans, in this case, implement the text of ERISA. They also vest Frank with the sole right to designate the beneficiary and direct the plan administrator to pay the plan benefits to the designated beneficiary. They also provide a procedure for Frank to change the designated beneficiary – a procedure that Frank never invoked.

ERISA and the plans also admit two exceptions to the directed payment to the designated beneficiary. Undisputedly, neither exception applies.

The text of ERISA speaks volumes by what it says and what it does not say. It sets forth a simple direction that is easily applied uniformly and nationally. The majority of the Texas Supreme Court admits this. *Keen*, 46 Tex. Sup. Ct. J. at 805-806. The text of ERISA proves that Congress knows how to impose exceptions to this straight-forward rule and that Congress only imposes two inapposite exceptions. The text of ERISA does not admit any exception for the type of waiver based upon the construction of a state law divorce recognized in *Keen*.

It also states that Frank's ability to designate or retain a plan beneficiary is limited only by his personal choice. It does not limit his choice to relatives. He can choose a

former spouse, his mother or even a totally unrelated person. He can chose someone who has an interest in the plans or someone who does not have any interest in the plans. He may choose someone, like Patsy, who no longer has a community interest in the plans. He can change his mind and choose to designate Patsy regardless of what divorce settlement had been reached.

It also states that the plan administrator does not have to go behind Frank's choice. The plan administrator does not have to ask why Frank respectively designated or retained his former spouse and his mother, rather than his then current wife, as the designated primary and contingent beneficiaries. The plan administrator does not have to inquire into the clean hands or unclean hands of the plan participant or the designated beneficiary. The plan administrator does not have to inquire into the speed, diligence or sloth of the plan participant or the plan beneficiary. The text of ERISA gives fruition to the ordered liberty of personal choice of the plan participant.

B. Preemption Precludes Looking Beyond the Text of ERISA:

The majority cannot rely upon Texas law to alter the text of ERISA. The majority does so and thereby impermissibly creates conflicts with the text of ERISA and the opinions of this Court.

The text of ERISA prohibits attempts to add exceptions to the text of ERISA directly or indirectly through state law. It states that ERISA "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan." ERISA § 1144(a). It then broadly defines "state law" to

include all laws, rules, decisions, regulations, or other state action having the effect of law of any state. ERISA § 1144(c).

This Court confirms the broad scope of preemption under ERISA. *Egelhoff*, 532 U.S. at 146. It further confirms that this preemption covers any state law that has an affect on the objectives of ERISA. *Id.* at 147. It concludes that the regulation of employee welfare benefit plans is exclusively a federal concern. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645, 656 (1995).

As such, the text of ERISA is the ultimate touchstone of any preemption analysis. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001). Any state law that relates to or is connected to a core textual obligation, such as the plan administrator's obligation to pay the plan benefits to the designated beneficiary, is preempted. *Egelhoff*, 532 U.S. at 147-148. Any state law that affects the designation of a beneficiary under an ERISA plan is preempted. *Boggs v. Boggs*, 520 U.S. 833, 845 and 854 (1997). Any state law that interferes with nationally uniform plan administration and that subjects a plan administrator to a rule that varies by state or by the facts of each case usurps the purpose of ERISA and is preempted. *Egelhoff*, 532 U.S. at 148.

The majority opinion in *Keen* is a state law under ERISA § 1144(c). Moreover, its reliance upon the legal and factual effect of a Texas divorce decree or of a Texas agreement incident to the Texas divorce decree to define the plan administrator's obligation encumbers the plan administrator with construing the effect of Texas law to define the scope of the plan administrator's obligation. Consider the majority's own conjecture about the effect of the facts comprising

waiver: "If the agreement were limited to Section 4.02, it might not be sufficient to waive Patsy's beneficiary interest." *Keen*, 46 Tex. Sup. Ct. J. at 808. Therefore, each plan administrator will have to review the scope of each divorce decree or each divorce agreement as those scopes are defined under Texas law, to determine whether the scope of the decree or agreement will comprise a waiver. The majority rule in *Keen* is a preempted state law that frustrates the purposes of ERISA.

The majority in *Keen* grounds its approach in a rule that looks to see if the effect of the Texas divorce decree or Texas agreement incident to divorce waives ". . . Patsy's beneficiary interest." The majority has shifted the analysis from ERISA's directive that Frank has the sole right to designate the plan beneficiary regardless of whether the beneficiary owns an interest or not in the plan, to a focus of whether Patsy can designate herself as a plan beneficiary. The majority rule in *Keen* is a preempted state law that frustrates the purposes of ERISA.

The majority concedes that the Texas current and prior redesignation statutes [Pet. App. E] are preempted. *Keen*, 46 Tex. Sup. Ct. J. at 807. That means that a Texas divorce decree or a Texas divorce agreement cannot be the nexus through which Patsy is redesignated as the plan beneficiary; any such attempt to use a Texas divorce decree or Texas divorce agreement is preempted. *Egelhoff*, 532 U.S. at 148-152. The majority cannot escape this preemption by achieving the same result through a different label. The majority even admonishes the Texas intermediate appellate court for doing this. *Keen*, 46 Tex. Sup. Ct. J. at 807. It then did the exact admittedly forbidden same thing as the Texas intermediate appellate court. *Keen*, 46 Tex. Sup.

Ct. J. at 805-808. It redesignated Patsy through the nexus of the Texas divorce proceeding. The majority rule in *Keen* is a preempted state law that frustrates the purposes of ERISA.

The majority indulges an unstated, but imposing, presumption that Frank cannot choose to designate or retain Patsy as a plan beneficiary after the divorce because of the Texas divorce decree and Texas divorce agreement. The majority admits no exceptions and thereby erects an irrebuttable presumption using the bricks of Texas law measured through the Texas divorce decree and the Texas divorce agreement. The majority rule in *Keen* is a preempted state law that frustrates the purposes of ERISA.

C. There is No Available Federal Common Law to Look Beyond the Text of ERISA:

The majority in *Keen* cannot "find" a federal common law to alter the text of ERISA. The majority so found and thereby impermissibly creates more conflicts with the text of ERISA and the opinions of this Court.

Under ERISA, this Court affirms that a federal common law cannot be used to revise the text of ERISA. *Mertens v. Hewitt Associates*, 508 U.S. 248, 259 (1993). This affirmation is an application of the general rule that there is no available federal common law that allows a court to create exceptions to an otherwise unambiguous statute. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994). The majority, however, used an alleged federal common law to create a new exception to the text of ERISA in conflict with *Mertens* and *O'Melveny*.

The majority asserts that there is a general federal common law of trust under ERISA that is a starting point for

courts to wreak havoc on the text of ERISA. *Keen*, 46 Tex. Sup. Ct. J. at 806. The majority's citation to *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101, 110 (1989) is misplaced.

In *Firestone*, this Court stated that, "[a]lthough [ERISA] is a 'comprehensive and reticulated statute,' . . . ERISA does not set out the appropriate standard of review for actions under § 1132(a)(1)(B) challenging benefit eligibility determinations. *To fill this gap*, federal courts have adopted the arbitrary and capricious standard. . . ." *Id.* at 109. [citations omitted] [Emphasis Added]]. *Firestone* represents one of the few and restricted times this Court found a federal common law, namely to fill a gap in the text of ERISA necessary for the plan administrator to discharge its fiduciary obligations.

This Court explains that there is no gap in the text of ERISA that mandates that the plan administrator must pay the designated plan beneficiary according to the plan. *Egelhoff*, 532 U.S. at 148 and fn. 1. It rejects any attempt to create a gap in the text simply because this language does not list every possible payment scenario, including waiver. *Id.*

The majority, however, holds that there is a gap because the text of ERISA does not mention waiver. The majority did exactly what this Court holds a court cannot do. The majority rule in *Keen* conflicts with *Egelhoff*.

The majority recognizes that the Texas Supreme Court had recently held that equitable trust principles could not be used to interfere with uniform ERISA administration. *Keen*, 46 Tex. Sup. Ct. J. at 807, *citing, Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001). Yet, it dismisses this prior correct

holding as a plurality decision that invited the development of a federal common law. *Id.* The dissent correctly notes the lack of any rationale for the majority's argument. *Keen*, 46 Tex. Sup. Ct. J. at 812.

The majority's strained construction of its own precedent underpins the majority's improper ruling. It also explains why the majority never addresses the true wellspring of the alleged federal common law.

The majority relies upon *Firestone*, but it does not discuss that the trust law it imports to alter the text of ERISA is the full panoply of trust law developed over the two plus centuries of American jurisprudence. That jurisprudence includes (ERISA preempted) state case law and state statutory law and treatises on trusts and the restatement of the law of trusts. *Firestone*, 489 U.S. at 954.

As such, under the majority rule in *Keen*, a plan administrator will first have to wait until the federal courts map out the contours of the alleged federal common law. With eleven circuits and multiple federal district courts, plan administrators can expect many years of uncertainties and years of conflicting decisions before some uniform rules emerge to decide who a proper beneficiary will be. It is also unclear whether all or only part of the entire body of equitable trust law and equitable maxims will be incorporated into the new law of alleged waiver. The dissent correctly points out that there presently is a lack of unanimity among the case law the majority relies upon as to what the actual elements of an alleged waiver are. *Keen*, 46 Tex. Sup. Ct. J. at 811-812. In short, a plan administrator will not know for a long time how to determine a proper beneficiary if the majority's waiver exception applies. There will not be a uniform national rule of plan administration.

The wake of this rule will be that a plan administrator will have to conduct a case-by-case, fact-intensive analysis of each decision to pay plan benefits. For example, the plan administrator will have to determine the intent of the plan participant, if a designated plan beneficiary "waived" some rights, whether the plan participant "waived" the "waiver," whether the plan participant was diligent or slothful or whether all parties have clean hands. This resulting morass is the antithesis to ERISA's stated goal to have a simple, harmonious and national administration unencumbered by fact findings and unchartered variables.

The majority rule in *Keen* will perpetuate the same type of litigation that Keen has had to endure. That will be the only way in which a plan administrator would know for certain who to pay.

That is exactly why the text of ERISA mandates the payment to the designated beneficiary. That is why this Court holds that there is no federal common law to create a waiver exception not found in the text of ERISA.

D. The Majority Rule in *Keen* Conflicts with the Anti-Alienation Text of ERISA:

The majority rule in *Keen* compounds the prior conflicts by further conflicting with the core anti-alienation text of ERISA. This rule impermissibly tries to re-write the text of ERISA.

The above cited relevant text of ERISA seeks and yields nationally uniform plan administration. *Egelhoff*, 532 U.S. at 142-152. This Court assiduously protects ERISA's salutary purpose. *Id.*

As a result and as stated above, plan administrators have the rules that govern the payment duty. As a further result and as stated above, Congress has mandated that the rules be applied to plan documents with limited exceptions. These rules are for the benefit of participants and beneficiaries. *Shaw v. Delta Air Lines, Inc.* 463 U.S. 86, 90 (1983).

ERISA § 1056(d)(1) is one of those rules. It prohibits the alienation or assignment of plan benefits except as allowed under ERISA § 1056(d)(3)(A). The anti-alienation provisions are designed to provide a dependable stream of income for participants and their heirs or dependents. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990).

The scope of the anti-alienation provision is broad and pervasive. The anti-alienation provision has prevented the use of an equitable constructive trust to seize pension plan benefits for repayment of amounts embezzled by a former union official. *Guidry*, 493 U.S. 365, 371-72. The anti-alienation provision also trumps ordinary bankruptcy rules and prevents individual pension plan interests from becoming assets of the bankruptcy estate subject to the claims of creditors. *Patterson v. Shumate*, 504 U.S. 753, 760 (1992).

ERISA further prohibits the alienation of benefits through the use of a domestic relations order; instead, the order to be recognized must be a "qualified domestic relations order." ERISA § 1056(d)(3)(A), *Boggs*, 520 U.S. at 848. ERISA preempts all other attempts to use state domestic relations law to override ERISA plan beneficiary designations. *Id.*

In the teeth of the comprehensive nature of ERISA, of its anti-alienation language and of its limited statutory exceptions, the majority tries to find a permissible gap that erodes the anti-alienation provisions. The majority's rule of waiver requires that a plan administrator must disregard the provisions of ERISA §1056 and to make beneficiary determinations in a manner contrary to the framework of the statute. Thus a plan administrator is forced to make an assignment or alienation of pension plan benefits in a way that is incompatible with ERISA's anti-alienation provision.

Plans may not give effect to an alienation not authorized by an express ERISA exception, whether purportedly imposed by state law or by some "generalized equitable exception." *Guidry*, 493 U.S. at 376; *see also Patterson*, 504 U.S. at 760. Yet giving effect to the common law rule does exactly that.

While revision of ERISA is not exactly the same thing as just ignoring the existing language of the statute in order to find a gap, as applied to this dispute, there is no substantive distinction. The Court in *Mertens* used essentially the same analytical approach as it used in *Egelhoff* to find that the federal common law in *Mertens* could not exist in the face of the specific language of ERISA. *Mertens*, 508 U.S. 248.

The Secretary of Labor in its amicus brief before the Texas Supreme Court concludes, "[b]ecause ERISA itself provides the applicable rules governing payments to beneficiaries, the . . . recognition of [a] federal common law is misguided; ERISA simply leaves no room for a judge-made creation of additional special ERISA rules in derogation of existing rules expressly provided by the statute" (relying in part on *McMillan v. Parrott*, 913 F.2d 310, 310-312 (6th Cir.

1990)). The Secretary of Labor advocates the holding of *Egelhoff* that all but forecloses any resort to federal common law in this context and instead strongly bolsters what the language of ERISA provides: plan administrators are to follow plan documents to determine beneficiary status under any ERISA-governed plan.

II. THERE IS AN IRRECONCILABLE CONFLICT BETWEEN THE HOLDINGS IN THE CASE LAW (INCLUDING DECISIONS OF THIS COURT) THAT "STRICTLY FOLLOW" THE TEXT OF ERISA AND THE HOLDINGS IN THE "VARIABLE COMMON LAW" CASE LAW THAT SEEK TO MODIFY THE TEXT OF ERISA SUCH THAT THE OBLIGATIONS OF PLAN ADMINISTRATORS VARY FROM JURISDICTION TO JURISDICTION IN LIEU OF THE UNIFORM NATIONAL STANDARD THAT ERISA REQUIRES.

Egelhoff resolves the conflict between the case law, such as *Egelhoff* and *McMillan,* that strictly follows the text of ERISA, and case law, such as *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown*, 897 F.2d 275 (7th Cir. 1990) and *Estate of Altobelli v. International Business Machines Corp.*, 77 F.3d 78 (4th Cir. 1996), that alters the text of ERISA through an alleged federal common law or similar improper approach. Unfortunately, the resolving influence of *Egelhoff* has been ignored. The Court should grant this petition to review this case, to reverse the Texas Supreme Court's decision in *Keen* and to resolve this conflict once and for all.

Since *Egelhoff*, there have been a series of decisions that, for all apparent purposes, gives little weight or significance

to *Egelhoff* (e.g. *Keen, Silber v. Silber*, 99 N.Y.2d 395 (N.Y. App. 2003), and *Melton v. Melton*, 324 F.2d 941 (7th Cir. 2003)). These decisions attempt to revive or to rely on the reasoning in decisions such as *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000), *Fox Valley*, 897 F.2d 275, *Lyman Lbr. Co. v. Hill*, 877 F.2d 692 (8th Cir. 1989), and *Brandon v. Travelers Ins. Co.*, 18 F.2d 1321 (5th Cir. 1994). All of the cases following *Egelhoff* recognize the existence of *Egelhoff* but none appear to be willing to give it its due or to recognize the significance of *McMillan*, 913 F.2d 310.

It cannot be doubted that *Egelhoff* intends to correct the decisions, other than *McMillan*, that have deviated from *ERISA's* framework and to re-establish the anchor of ERISA's unambiguous text. However, the failure of the post-*Egelhoff* cases to recognize its significance and to properly analyze the effect of ERISA § 1104(a)(1)(D) has resurrected the problem identified and addressed by *Egelhoff*. This conflict arising so soon after *Egelhoff* and the aggressive deviation from the path established in that case is highly indicative of the need to grant the writ of certiorari sought herein.

CONCLUSION

Petitioner Patsy Keen requests that, for the reasons stated in her petition, the petition be granted and thereafter that this Court reverse the decision of the Texas Supreme Court and confirm her entitlement to the plan benefits in question.

Respectfully submitted,

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